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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 376

KEYES C. GAYNOR,

Petitioner,

vs.

METALS RESERVE COMPANY,
a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Law Briefs—OMAHA LINO-SLUG PRINTING CO.—413 South 15th Street

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o———o———o

Keyes C. Gaynor, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on May 6, 1949. (Petition for Re-Hearing denied August 3, 1949, R. 67.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (R. 60) is reported at 174 F. (2d) 286.

An earlier opinion of the Court of Appeals for the Eighth Circuit indirectly concerned with the issues now before the Court is reported at 166 F. (2d) 1011.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 6, 1949 (R. 63). A Petition for Re-hearing, seasonably filed, was denied on August 3, 1949 (R. 67). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code, enacted on June 25, 1948, effective September 1, 1948. (Public Law 773, 80th Congress, 2d Sess.)

QUESTION PRESENTED

By the Joint Resolution of June 30, 1945 (c. 215, 59 Stat. 310), also referred to as Public Law 109, Congress provided for the dissolution, on July 1, 1945, of the Metals Reserve Company, a corporation, and certain other named government owned corporations. It was provided, however, that no suit previously instituted by or against such corporations should abate by reason of their dissolution, but that, within twelve months thereafter, a Court, on proper showing, might allow the suit to be maintained by or against their parent and successor corporation, Reconstruction Finance Corporation. The question is whether, in the absence of the substitution of the Reconstruction Finance Corporation within twelve months of Metals Reserve Company's dissolution, the appellate court is without jurisdiction to review the merits of the case on appeal (having been theretofore fully submitted on appeal to said Court on the merits) and to find that the District Court is without jurisdiction to try the issues involved and to dismiss the appeal in the U. S. Court of Appeals for the Eighth Circuit from the said District Court.

STATUTORY PROVISIONS INVOLVED

The Joint Resolution of June 30, 1945, C. 215, 59 Stat. 310, reads as follows:

JOINT RESOLUTION (Public Law 109)

To transfer to the Reconstruction Finance Corporation the functions, powers, duties, and records of certain corporations.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporation hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporation to which this joint resolution applies.

Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the Court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945.

Approved June 30, 1945.

STATEMENT

This action was originally commenced by Keyes C. Gaynor, plaintiff, against the Metals Reserve Company, a corporation, defendant, and another, to recover in the State Court of the State of South Dakota (Circuit Court of the Seventh Judicial District of the State of South Dakota for Custer County) (R. 1) $12,956.49 for sheet mica sold and delivered by plaintiff to defendant in South Dakota, and to recover the further sum of $20,868.96 for damages for failure of defendant to accept certain mica mined and offered by plaintiff. The action was begun in the State Court of South Dakota on the 30th day of March, 1945 (R. 61). The causes of action sued upon arose in the State of South Dakota and were not based upon any federal statute. The action was removed by the defendant to the United States District Court of the State of South Dakota, Western Division on April 27, 1945, on the grounds that the Metals Reserve Company, defendant, was a corporation incorporated pursuant to 606b (3) of the United States Code, a wholly owned subsidiary of the Reconstruction Finance Corporation, which latter company is an agency or instrumentality of the United States of America, all of whose stock is owned by the government of the United States and that all of the stock of the Metals Reserve Company is owned by the Reconstruction Finance Corporation, and that said matter in controversy involved more than $3,000.00 and was a suit over which United States Courts are given original jurisdiction. An answer of the defendant, Metals Reserve Company, was filed on June 4, 1946, alleging that

plaintiff's complaint failed to state a claim upon which relief could be granted and a general denial. Public Law 109 was not pleaded or suggested by defendant and the passage of said act on June 30, 1945, was unknown to plaintiff.

The issues in said action were made up at the June, 1946, term of the United States District Court of South Dakota, but the action was continued at the June, 1946, term because the defendant had failed to file answer according to the rules of the Court. That in June, 1947, the defendant, Metals Reserve Company, filed a motion to abate the action because no substitution was made prior to July 1, 1946, under Public Law 109. This was the first knowledge plaintiff had of the passage of Public Law 109. No suggestion of the passage of the Act of Congress had been made by defendant prior to June, 1947, although the said defendant had filed motion in June, 1945, to dismiss on other grounds, which motion was submitted to the Court in September, 1945; answer was filed by Metals Reserve Company in June, 1946, too late for trial under the rules for trial at the June, 1946, term, and the action was continued by consent of the defendant, Metals Reserve Company, until the June, 1947, term of said Court. The same attorney for the defendant, Metals Reserve Company, appeared at all times before and after July 1, 1946, both in the District Court and the Appellate Court.

On June 3, 1947, 23 months after the passage of Public Law 109, the defendant, Metals Reserve Company, in the District Court filed a motion to dismiss plaintiff's complaint because plaintiff had failed to file any proceedings under Public Law 109 to substitute the Reconstruction Finance Corporation for the Metals Reserve

Company, defendant, and alleging that the pending action was abated under Public Law 109. The District Court on June 4, 1947, sustained the motion of defendant, Metals Reserve Company, and abated the action. The decision of the United States District Court of South Dakota abating the action was appealed to the United States Circuit Court of Appeals for the Eighth Circuit and the decision of the District Court was reversed and the case remanded for trial (*Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011). The above cited decision fully sets out the facts and holds that the District Court had jurisdiction to try the issues.

On re-trial of the action in the United States District Court of the State of South Dakota the District Court dismissed on August 20, 1948, the plaintiff's action upon its merits (R. 14, 15) at plaintiff's costs. Appeal by the plaintiff from the decision and judgment of said District Court and as amended was taken to the United States Court of Appeals for the Eighth Circuit on September 17, 1948 (R. 20, 21). On March 8, 1949, the appeal in said cause after hearing before the Court was submitted to said Appellate Court (R. 60). On May 6, 1949, the United States Court of Appeals for the Eighth Circuit filed a per curiam opinion (R. 61) and judgment (R. 63) dismissing said appeal and holding that said Court was without jurisdiction to review the merits of the case on appeal and that the District Court was without jurisdiction to try the issues involved (R. 63).

A Petition for Re-hearing was filed by the petitioner and appellant on July 15, 1949, within the time ordered by the Court (R. 65), and on August 3, 1949, the said Court denied the appellant's Petition for Re-hearing (R. 67).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Eighth Circuit erred:

1. In holding that the decision of this Court in the case of *Defense Supplies Corporation and Reconstruction Finance Corporation v. Lawrence Warehouse Company, et al.*, 336 U. S. 631, controls the decision of the United States Court of Appeals for the Eighth Circuit and is binding on that Court to dismiss the appeal to review the merits of the instant case on appeal and to hold that the District Court is without jurisdiction to try the issues involved.

2. In holding that because the plaintiff, Gaynor, at no time filed a motion or Supplemental Petition asking that he be allowed to maintain his action against the Reconstruction Finance Corporation as a result on July 1, 1946, the action against the Metals Reserve Company "was at an end" and that said Court was without jurisdiction to review the merits of the case on appeal and that the District Court was without jurisdiction to try the issues involved.

3. In holding that the failure to effect such a substitution is a defect in jurisdiction and not in form.

4. In holding that in the absence of a substitution of the R. F. C. for the Metals Reserve Company the said Court was without jurisdiction to review the merits of the case on appeal which had been submitted to the Court on the merits and was pending in that Court.

5. In failing to distinguish the facts in the case in this Court relied upon as binding from the facts of the instant case upon appeal before the lower Court.

6. In assuming that the case of *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631, decided that there was a conflict between the case of *Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011, in the Eighth Circuit and the *Defense Supplies Corporation, et al., v. Lawrence Warehouse Company, et al.*, 168 F. (2d) 199, in the Ninth Circuit, when as a matter of fact this Court did not so decide.

7. In holding that in the instant case, without reversing its former decision in 166 F. (2d) 1011, the Court was without jurisdiction to review the merits of the instant case on appeal and that the District Court was without jurisdiction to try the issues involved after the Court had already held that the District Court had jurisdiction to try the issues and on appeal had remanded the case for trial in the District Court (166 F. (2d) 1011).

8. In failing to follow its holding on the prior appeal that the cause of action in the present case was a continuing action lawfully commenced under the laws of the State of South Dakota and not under a federal statute and that Section 33.0414, South Dakota Code of 1939, governs without any limitation of time in case of a transfer of interest as provided by the Joint Resolution of June 30, 1945.

9. In failing to afford the plaintiff and petitioner a reasonable opportunity to be heard after notice upon the question of jurisdiction the per curiam decision of the lower Court offends against "Due Process of Law" and violates the Fifth Amendment to the Constitution of the United States.

10. In failing to apply the Federal Conformity Act (U. S. C. A., Title 28, Section 724) for the reason that the present case arose and was commenced under the laws of the State of South Dakota and not under a Federal Statute, and Section 33.0414, South Dakota Code of 1939, not in conflict with Public Law 109, should apply, which question was not involved or raised in the decision of this Court relied upon by the lower Court. Section 33.0414, South Dakota Code of 1939, is as follows:

> "No action shall abate by the death or other disability of a party, or, by transfer of any interest therein if the cause of action survive or continue.
> * * *
> "In case of any other transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action."

11. In failing to follow its decision (166 F. (2d) 1011, at p. 1015) that Rule 25 (c) of the Rules of Civil Procedure govern in the present case, which question was not involved or raised in the decision of this Court now referred to as binding upon the lower Court.

REASONS FOR GRANTING THE WRIT

The Court below erroneously held in a per curiam opinion, 174 F. (2d) 286, that the decision of this Court in the case of *Defense Supplies and Reconstruction Finance Corporation v. Lawrence Warehouse Company,* 336 U. S. 631, was binding upon it to such an extent that the within action of the petitioner, Gaynor, against the Metals Reserve Company "was at an end," and that said lower Court was without jurisdiction to review the merits of the case on appeal and the District Court was without jurisdiction to try the issues involved. At the time

(June 6, 1949) the said per curiam opinion was rendered an appeal from the decision of the District Court dismissing the action of the plaintiff on the merits had been submitted on March 8, 1949, to the Court below and the appeal on the merits was pending. In the appeal pending before the lower Court the question of jurisdiction had not been raised and was not before the Court at that time as the Court by a former decision on March 25, 1948, had decided the question of jurisdiction in favor of the plaintiff, Gaynor, and against the defendant, Metals Reserve Company, and remanded for trial the case to the District Court on the merits (166 F. (2d) 1011).

By the per curiam opinion and judgment the said Court of Appeals dismissed an appeal from a decision of the District Court on the merits on the ground of lack of jurisdiction upon which question that very Court had previously reversed a decision of the District Court abating the action, the lower Court now dismisses a suit begun more than four years ago, which has been completely tried and fully argued in the trial Court and on appeal, not on the merits, but solely because the R. F. C. had not been substituted within twelve months after the taking effect of the Joint Resolution of Congress on July 1, 1946. All of this notwithstanding under the congressional mandate of June 30, 1945, that no suit theretofore commenced by or against the Metals Reserve Company should abate because of its enactment. As the sole grounds for said dismissal the lower Court relies upon the decision of the Supreme Court of the United States in the case of *Defense Supplies Corporation v. Lawrence Warehouse Co.*, 336 U. S. 631.

1. We submit that the case in this Court thus relied upon as ending the instant case for lack of jurisdiction

should not control the decision of the lower Court as nowhere in the case in this Court does this Court refer to the decision in the case of *Gaynor v. Metals Reserve Company,* 166 F. (2d) 1011, except to state at the beginning of the opinion, to-wit:

> "We brought the case here on certiorari, because of alleged conflict with Gaynor v. Metals Reserve Company, 166 F (2d) 1011, in the Court of Appeals for the Eighth Circuit."

Outside of the above statement this Court never commented on the Gaynor case in the Eighth Circuit or on any conflict with the case in the Ninth Circuit. Nor did it decide that there was no conflict.

The case in this Court does not decide that the decision of the Eighth Circuit in the Gaynor case as reported in 166 F. (2d) 1011 is wrong or that it should end an Appeal on the merits pending before that Court as the per curiam opinion here complained of implies.

2. In the present case the petitioner, Gaynor, was the plaintiff instead of the Defense Supplies Corporation as in the case in this Court and the governmental corporation, the Metals Reserve Company, was the defendant instead of the Lawrence Warehouse Company. Not until June 3, 1947 (23 months after the passage of Public Law 109), did the defendant, Metals Reserve Company, ask the Court to abate the action because no proceedings had been taken to have the R. F. C. substituted as a party defendant for the Metals Reserve Company. Obviously an entirely different situation existed in the present case by the failure of the defendant, Metals Reserve Company, to suggest a substitution of the R. F. C. under Public Law 109 than existed in the Lawrence Warehouse Com-

pany case as in that case the governmental corporation was seeking damages. In the present case the governmental corporation was the defendant and by failing to file a motion for substitution clearly waived the defense.

3. The per curiam opinion of the Court below holds that the failure to make the substitution was a defect in jurisdiction and not in form. On account of the fact that in the present case the parties are reversed from the case in this Court relied upon by the lower Court we submit that the Court might well hold that the defendant, Metals Reserve Company, by its failure to suggest the passage of Public Law 109 and a substitution of the R. F. C. until 23 months after the passage of the law had lost its right to claim lack of jurisdiction and that it was a defect in form and not of jurisdiction.

4. It should be remembered that the lower Court had already sustained its jurisdiction and reversed the lower Court and remanded the case for trial, which trial had been completed on the merits, and appeal therefrom taken to the higher Court, and which appeal had been there submitted on the merits and was pending when the per curiam opinion was rendered.

5. In the decision of this Court relied upon in the lower Court as binding upon it the Defense Supplies Corporation had sued the Lawrence Warehouse Company for damages due to negligence from a warehouse fire. The suit was originally brought in the United States District Court of California. The question of jurisdiction for failure to substitute the R. F. C. was raised by the defendant, Lawrence Warehouse Company. In the instant case the suit was originally commenced in the State Court of South Dakota and removed to the United States Dis-

trict Court because the defendant was a governmental corporation. In the present case we have an entirely different situation from the case in this Court relied upon by the lower Court.

If the Defense Supplies Corporation had been the defendant in the Lawrence Warehouse Company case and had not raised the question of jurisdiction until 23 months after the passage of the Joint Resolution, it is fair to assume that the decision in the case in this Court would have denied the dissolved corporation to take advantage of its delay in raising the question of jurisdiction.

6. We respectfully submit that this Honorable Court did not decide that there was a conflict between the case of *Defense Supplies Corporation v. Lawrence Warehouse Company,* 168 F. (2d) 199, in the Ninth Circuit, and the case of *Gaynor v. Metals Reserve Company,* 166 F. (2d) 1011, in the Eighth Circuit. It is true that this Court granted the Petition for Certiorari to the Ninth Circuit because there was an *alleged* conflict between the cases in the two circuits. But nowhere in the opinion in this Court did the Court decide that there was a conflict. The only reference was to an *alleged* conflict between the two cases.

The Joint Resolution dissolving the Defense Supplies Corporation (plaintiff in the Lawrence Warehouse Company case) commanded that the R. F. C. "shall perform" the duties of the dissolved corporations. In this duty R. F. C. failed, and by reason of that failure the Court of Appeals in the Ninth Circuit held that the action abated. In the Gaynor case the action was against the Metals Reserve Company, one of the dissolved corporations under the Joint Resolution, and again the R. F. C. failed in its stated duty, and the Court of Appeals held that it could not take advantage of that failure.

If the above reasoning be adopted there was no conflict in the results of the Lawrence Warehouse case in the Ninth Circuit and the Gaynor case in the Eighth Circuit and upon the failure of the R. F. C. to perform the duties of the dissolved corporation as commanded by the Joint Resolution the decisions in both of the adjudicated cases can be justified and reconciled.

The lower Court in the present case, in its decision on May 6, 1948, mistakenly assumed that its opinion in 166 F. (2d) 1011 had been reversed and that the opinion relied upon in this Court was a mandate to end the petitioner's cause of action. In this the lower Court erred.

7. The lower Court did not in its per curiam opinion of May 6, 1949, reverse its prior decision in the present case, 166 F. (2d) 1011, in which decision the Court had expressly held that the District Court had jurisdiction to try the issues involved, and on appeal on the question of jurisdiction had remanded the case for trial in the District Court. The decision of the lower Court sustaining jurisdiction was based on grounds not argued or relied upon in the case in this Court. Until the decision in 166 F. (2d) 1011 is reversed by this Court the principles therein announced should stand as the law of the present case.

8. The United States Court of Appeals in the Eighth Circuit in the prior opinion in the case of *Gaynor v. Metals Reserve Company,* 166 F. (2d) 1011, at page 1013, announced:

> "Plaintiff's cause of action was not one dependent upon a federal statute, and by the laws of South Dakota such an action does not abate by transfer of any interest pending litigation. Thus, Section 33.0414, South Dakota Code, provides that:

"'No action shall abate by the death or other disability of a party, or, by transfer of any interest therein if the cause of action survive or continue.
* * *

"'In case of any other transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action.'"

The lower Court further held:

"Manifestly, plaintiff could sustain this action under the laws of South Dakota notwithstanding the fact that defendant's assets had been transferred to the Reconstruction Finance Corporation."

In the case in this Court, now relied upon by the Court of Appeals in the Eighth Circuit, the action had not been commenced in the State Court and the question of a state statute was not involved or raised.

We respectfully submit that the principle above announced in 166 F. (2d) 1011 at page 1013 should govern the present case. That the matter of a state statute was not involved or raised in the Defense Supplies Corporation case in this Court, now announced by the lower Court as binding, and compelling dismissal of petitioner's appeal on the merits.

9. The Court of Appeals in the Eighth Circuit announced its judgment and rendered its per curiam opinion on May 6, 1949, on the question of jurisdiction, dismissing petitioner's appeal without notice to the petitioner or affording a hearing to the petitioner on the question of jurisdiction. The case had already been submitted to the Court of Appeals on the merits on March 8, 1949, and before that Court was still pending. No question of jurisdiction was involved or had been raised either in the District Court or on the appeal on the merits. That question

in favor of the plaintiff, Gaynor, and against the defendant, Metals Reserve Company, had been squarely settled in the prior appeal and decision of March 25, 1948, as reported in 166 F. (2d) 1011.

Without notice to the petitioner or affording a hearing, the lower Court in a per curiam opinion arbitrarily holds that petitioner's case is "at an end" and dismisses his appeal on the ground that the appellate Court does not have jurisdiction to consider the appeal on the merits and that the District Court does not have jurisdiction to try the issues of the controversy.

Thus by failing to afford the plaintiff and petitioner after notice a reasonable opportunity to be heard upon the question of jurisdiction, we respectfully submit that the per curiam decision and judgment of the lower Court offends against "Due Process of Law" and is in violation of the Fifth Amendment to the Constitution of the United States.

10. The United States Court of Appeals for the Eighth Circuit in the prior appeal in *Gaynor v. Metals Reserve Company,* 166 F. (2d) 1011, at page 1015, held:

> "Rule 25(c) of the Rules of Civil Procedure provides as follows:
>
> " 'In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be submitted in the action or joined with the original party.'
>
> "This rule seems to warrant continuing a pending action against the original party even though there be a transfer of interest, unless the court upon motion shall direct the person to whom the interest is transferred to be substituted in the action or joined with

the original party. No such motion was here made and in the absence of such a motion it would seem that the action might properly be prosecuted against the original defendant notwithstanding the fact that under the provisions of the Act dissolving defendant the Reconstruction Finance Corporation might have been substituted. Rule 25(c) is substantially the same as Section 385, California Code of Civil Procedure. In the case of Malone v. Big Flat Gravel Mining Co., 93 Cal. 384, 28 P. 1063, 1065, the Supreme Court of California, in construing this section, said:

" 'If no substitution is asked for, the case will go on in the name of the original party, as if no transfer had been made; and to have it do so no application to or action by the court is necessary.'

"See, also: Cleverdon v. Gray, 62 Cal. App. (2d) 612, 145 P. (2d) 95; Davis v. Rudolph, Cal. App., 181 P. (2d) 765; United States ex rel. Johnson v. Morley Construction Co., 2 Cir., 98 F. (2d) 781."

The case of *Davis v. Rudolph* (Calif.), 181 P. (2d) 765 at p. 768 (2), is directly in point:

"If no substitution is asked for, the case will go on in the name of the original party as if no transfer had been made; and to have it do so, no application is necessary."

Rule 25(c) of the Rules of Federal Civil Procedure was not involved or raised in the case in this Court, relied upon by the lower Court. Neither was Rule 25(c) called to the attention of the lower Court in the Lawrence Warehouse Company case. Nowhere was that procedural rule referred to or considered in the case in this Court, relied upon by the lower Court.

Inasmuch as the decision of the Eighth Circuit relied upon Rule 25(c) as being applicable to the present case

it would seem that in the absence of its consideration here that the case of *Gaynor v. Metals Reserve Company,* 166 F. (2d) 1011, at page 1015, still stands as the law of the instant case, and which principle the lower Court in its latest pronouncement, by way of a per curiam opinion, overlooks.

11. The Joint Resolution of June 30, 1945, was remedial in character and such statutes should be construed liberally.

National Labor Relations Board v. Timken Silent Automatic Co., 114 F. (2d) 449, 450 (2 Cir.).

Eastman, Gardener & Company v. Warren, 109 F. (2d) 193 (5 Cir.).

The Eighth Circuit Court of Appeals construes the limitation contained in the Joint Resolution of June 30, 1945, as applicable only to the right which the resolution grants to litigants to hold the successor and still going corporation, R. F. C., responsible for the debts of the Metals Reserve Company (*Gaynor v. Metals Reserve Co.,* 166 F. (2d) 1011, 1014). Such a construction appears to be a reasonable one.

This Court has held "The statute states categorically that 'no action shall abate.' " To permit abatement, as has been done by the decision of the lower Court, under the facts of the instant case, would be contrary to R. S. 954 (28 U. S. C. (1916 Ed.) 777) that "No judgment * * * in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form." Although R. S. 954 was repealed effective September 1, 1948, by Section 39 of the Act of June 25, 1948 (Pub. Law 773, 80th Congress, 2d Sess.), it does not appear that its repeal affects the instant case since that section also provides:

"Any rights or liabilities now existing under such (repealed) sections or parts thereof shall not be affected by this repeal."

Thus, R. S. 954 would still seem to be applicable to the proceedings in this case before September 1, 1948, from which judgment an appeal is pending in the Appellate Court. Moreover, under the legislative history of the repealing act it was stated that the reason for repealing R. S. 954 was that Rules 1, 15, and 61 of the Federal Rules of Civil Procedure (see H. Rep. 308, 80th Cong., 1st Sess., p. A. 239) covered the subject matter of R. S. 954. As this Court said in *Hoiness v. United States*, 335 U. S. 297, 300-301:

Under "the mandate of that statute" it was the duty of the Court below "to disregard niceties of form and to give judgment as the right of the cause shall appear to it."

In the instant case "the right of the cause" should govern over the deficiencies of form in determining whether a litigant should be deprived of his right to have considered an appeal on the merits of his cause of action.

The legislative background of the Joint Resolution of June 30, 1945, discloses that Section 2 of the Joint Resolution was not intended to have any independent effect but was merely added by suggestion of a member of the committee as a cautionary measure to assure creditors and the named governmental corporation of the preservation of their rights. (See Hearings before Committee on Banking and Currency, U. S. Senate, on S. J. Res. No. 65, 79th Cong., 1st Sess., pp. 10-11; see also S. Rep. No.

285; H. Rep. No. 815; and Hearings before Com. on Banking and Currency, H. of Rep. on S. J. Res. 65; all in 79th Cong., 1st Sess.)

As the Court of Appeals for the 8th Circuit remarks, "It was the purpose of Congress to protect all vested rights by this positive declaration that the dissolution of the corporation should not disturb * * * vested rights nor that any action lawfully commenced should be abated" (166 F. (2d) at p. 1014).

Certainly petitioner's causes of action arising and sued under the laws of the State of South Dakota and pending prior to the passage of the Joint Resolution of June 30, 1945, were vested rights entitled to full protection under the Joint Resolution itself and of the laws of his state and country.

CONCLUSION

For the foregoing reasons it is respectfully submitted that his petition for a Writ of Certiorari should be granted.

KEYES C. GAYNOR, *Petitioner.*

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 376

KEYES C. GAYNOR, PETITIONER

v.

METALS RESERVE COMPANY, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 60-63) is reported at 174 F. 2d 286. The opinion of the United States Court of Appeals for the Eighth Circuit on the first appeal is reported at 166 F. 2d 1011.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 6, 1949 (R. 63). A petition for rehearing was

denied on August 3, 1949 (R. 67). The petition for a writ of certiorari was filed on October 7, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, upon failure to substitute the Reconstruction Finance Corporation for the Metals Reserve Company as defendant within one year of the effective date of the Joint Resolution of June 30, 1945 (*infra*, pp. 2-3), the district court is without jurisdiction to try a cause of action on the merits against the Metals Reserve Company and the Court of Appeals is without jurisdiction to hear an appeal on the merits.

STATUTE INVOLVED

Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company,

Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

Sec. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

Sec. 3. This joint resolution shall take effect on July 1, 1945.

Approved June 30, 1945.

STATEMENT

This action was originally brought by the petitioner Gaynor against the Metals Reserve Company in a state court of the State of South Dakota (Circuit Court of the Seventh Judicial District of the State of South Dakota for Custer County) on

March 30, 1945 (R. 1). The petitioner sought recovery against the Metals Reserve Company for mica sold and delivered and for damages resulting from the Metals Reserve Company's refusal to accept mica of the petitioner (R. 1-3).

On May 7, 1945, the action was removed to the United States District Court for the District of South Dakota, Western Division (R. 1, 3).

By the Joint Resolution of June 30, 1945, 59 Stat. 310 (Pub. L. No. 109), Congress dissolved the Metals Reserve Company and transferred all of its assets to the Reconstruction Finance Corporation which action was to take effect on July 1, 1945. On June 3, 1947, almost two years after the passage of the Joint Resolution, the respondent filed a motion for dismissal on the ground that the petitioner Gaynor had not moved the substitution of the Reconstruction Finance Corporation as defendant for the Metals Reserve Company within a year of the passage of Pub. L. No. 109 (R. 61). This motion was sustained by the district court on June 4, 1947, and the action was abated (R. 61). On appeal to the United States Court of Appeals for the Eighth Circuit, the dismissal was reversed and the case was remanded for trial, *Gaynor* v. *Metals Reserve Company,* 166 F. 2d 1011.[1]

Thereafter, the case proceeded to trial and after the conclusion of the petitioner's presentation in the district court, the court dismissed the action on

[1] At that time, the decision of this Court in *Defense Corporation* v. *Lawrence Company,* 336 U. S. 631, had not yet been handed down.

the ground that the petitioner had failed to prove by competent evidence that he had sold and delivered to the respondent any mica for which he had not been paid (R. 13-15). The evidence upon which the district court based its conclusion is set forth in the record (R. 25-44).

The petitioner then appealed from the judgment of the district court to the United States Court of Appeals for the Eighth Circuit on September 17, 1948 (R. 20, 21), and argument was heard on March 8, 1949 (R. 59). The United States Court of Appeals, on May 6, 1949, held, on the authority of *Defense Corporation* v. *Lawrence Company,* 336 U. S. 631 (decided April 18, 1949), that the district court was without jurisdiction to hear the cause of action on the merits and the appellate court was without jurisdiction to hear the appeal on the merits (174 F. 2d 286) (R. 60). It accordingly dismissed the appeal (R. 63). A motion for rehearing was denied on August 3, 1949 (R. 67).

ARGUMENT

This Court, in *Defense Corporation* v. *Lawrence Company*, 336 U. S. 631, was called upon to determine the effect of the Joint Resolution of June 30, 1945, upon an action in which there had been no substitution of the Reconstruction Finance Corporation for the dissolved, wholly-owned government corporation within one year of July 1, 1945. It stated (336 U. S. at 636):

> If Reconstruction Finance is not substituted within one year, *the action by or*

> *against Defense Supplies is, of course, at an end and the parties are left in status quo* * * * [italics added].

The court below not only correctly applied the *Lawrence Warehouse* case but reached the only conclusion possible in the light of that decision. After the expiration of the year, *i.e.* July 1, 1946, the posture of the case at bar, so far as the record shows (R. 3-10), was that an amended complaint and an answer thereto had been filed. On that date, action by petitioner against Metals Reserve Company was "at an end" and the parties were "left in status quo." Thereafter neither the district court nor the court below had any jurisdiction to consider the case on the merits.

But petitioner urges that the prior holding of the court below, in *Gaynor* v. *Metals Reserve Co.*, 166 F. 2d 1011—that the action had not abated but might be continued against Metals Reserve—became the law of the case and was controlling. This contention may be shortly disposed of. An intervening decision may even render inapplicable the doctrine of *res judicata*. *State Farm Ins. Co.* v. *Duel*, 324 U. S. 154, 162. *A fortiori* the doctrine of "law of the case" can import no less flexibility. *White* v. *Higgins*, 116 F. 2d 312, 317 (C. A. 1); *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie*, 104 F. 2d 227, 228 (C. A. D. C.); *Chicago, St. Paul, M. & O. Ry. Co.* v. *Kulp*, 102 F. 2d 352, 354 (C. A. 8); *American Surety Co.* v. *Bankers' Savings and Loan Associa-*

tion, 67 F. 2d 803, 807 (C. A. 8); *Higgins* v. *California Prune and Apricot Grower,* 3 F. 2d 896, 898 (C. A. 2); *Kelly-Springfield Tire Co.* v. *United States,* 110 F. 2d 823, 827 (C. A. 3). Consequently, the decision of this Court in the *Lawrence Warehouse* case furnished ample justification for the action of the court below in departing from its prior ruling.

Finally, the provisions of state law and of the Federal Rules of Civil Procedure, upon which petitioner relies (Pet. 14-18) can not be thought to override a federal statute specifically directed at the problem at hand. That statute, being constitutionally unobjectionable (*Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 389) must control.

CONCLUSION

We respectfully submit that the decision below is plainly correct and that the petition for a writ of certiorari should therefore be denied.

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DECEMBER, 1949.

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